Document:-
A/CN.4/3220

Summary record of the 3220th meeting

Topic:
Immunity of State officials from foreign criminal jurisdiction

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already complex enough. In any event, the Commission's practice was not to make a clear distinction between the two aspects of its mandate, recognizing as it did that they were two aspects of one and the same function.

The meeting rose at 11.30 a.m.

3220th MEETING

Thursday, 10 July 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/666, Part II, sect. B, A/CN.4/673, A/CN.4/L.850)

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the third report of the Special Rapporteur on the topic of immunity of State officials from foreign criminal jurisdiction (A/CN.4/673).

2. Mr. KAMTO said that he endorsed the Special Rapporteur's observations in chapter II, section A, of her third report concerning the term "official". In paragraph 19, she stated that the term "official" (*représentant*) was not the most suitable term for referring to all categories of persons who were covered by immunity from foreign criminal jurisdiction. He was of a different view, however, and he disagreed with her preference for the term "organ".

3. The term "organ" could refer to an individual, a physical person, or to an entity, in which case it was difficult to speak of criminal responsibility. One should recall the Latin maxim: *societas delinquere non potest*. Even today, when criminal responsibility was envisaged for corporations, it was actually the responsibility of the senior managers that was invoked—at least when the criminal responsibility of the physical person entailed a custodial sentence—and not the responsibility of the corporation itself. Moreover, a reference to an "organ" in the present context risked blurring the distinction between the immunity of representatives of the State and the immunity of the State itself.

4. He did not favour any of the alternatives to the term "official" proposed by the Special Rapporteur. The terms *agent* or *fonctionnaire* in French were entirely unsuitable since, in many French-speaking countries of Africa, they referred to employees of the public administration whose status was governed by the national labour code; they would thus not encompass all the persons that the Commission intended to cover.

5. The proposal to use the combined term *représentants et agents de l'État* would raise more questions than it would resolve, since in many French-speaking countries, it was possible for a *représentant de l'État* not to be an *agent de l'État*, but an *agent de l'État* was always a *représentant de l'État*, in the broad sense of the word "representative", and not in the strict sense in which it referred to the members of the troika and other high-level State officials.

6. However, the term *représentant de l'État* was broad enough to cover the members of the troika, who already enjoyed immunity *ratione personae*, and other persons, whether they were agents of the State, *fonctionnaires* or even *ad hoc* representatives of the State. The determining element, and, in fact, the sole criterion for identifying persons who enjoyed immunity from foreign criminal jurisdiction, was whether the person had acted on behalf of and in the name of the State. Such an approach would obviate the need to subdivide subparagraph (*e*) into subordinate subparagraphs (i) and (ii) in order to make a distinction between the members of the troika and the other persons acting on behalf of and in the name of the State. At the same time, so long as the treatment of the topic depended on making a fundamental distinction between immunity *ratione personae* and immunity *ratione materiae*, the distinction between those who enjoyed the two kinds of immunity had to be reflected in the definition of the term "State official". Consequently, the current structure of draft article 2 (*e*) did not pose insurmountable problems for him, and he was in favour of referring draft article 2 to the Drafting Committee.

7. With regard to the identification of the persons who enjoyed immunity from foreign criminal jurisdiction, a distinction also had to be made between the members of the troika and other State officials. The same justification used to grant the members of the troika immunity *ratione personae*—to facilitate relations between States—remained valid for granting them immunity *ratione materiae*. However, the same could not be said of other State officials, whose immunity might depend on the nature of the criminal offence they had committed, and was thus relative, not complete. Any reference to complete immunity for the members of the troika was, of course, without prejudice to the regime of criminal responsibility before international criminal courts. As was clearly indicated in article 27, paragraph 2, of the Rome Statute of the International Criminal Court, article 7, paragraph 2, of the Statute of the International Tribunal for the Former Yugoslavia[192] and article 6, paragraph 2, of the Statute of the International Tribunal for Rwanda,[193]

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[192] Security Council resolution 827 (1993) of 25 May 1993 (see the report of the Secretary-General presented pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704 and Corr.1 and Add.1, annex)).

[193] Security Council resolution 955 (1994) of 8 November 1994, annex.

the leaders of a State, whoever they might be, did not enjoy immunity before those courts. The crucial issue of impunity should be addressed on the basis of the following fundamental distinction: lack of immunity before an international criminal court did not necessarily entail lack of immunity from foreign criminal jurisdiction, and vice versa.

8. The third report did not raise the difficult question of whether all other State officials outside of the troika could be granted immunity from foreign criminal jurisdiction, which might be seen as implying that the Special Rapporteur considered that they could. The justification for such a rule under international law was debatable. To draw an analogy with the international criminal law regime, one could point out that the criminal jurisdiction of the international criminal courts and tribunals had thus far been limited only to the leaders and other senior officials of the State. He cited article 46A *bis* of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights as an example of the extension of immunity to "senior State officials" (*hauts fonctionnaires*). Should the regime on immunity from foreign criminal jurisdiction being developed by the Commission cover all State officials, or only certain ones? And if so, which ones? He suspected that the response could not be fully formulated before settling the question of the scope of immunity *ratione materiae*.

9. In its work on the draft code of crimes against the peace and security of mankind in 1951, the Commission had decided to restrict itself to crimes that included a political element or jeopardized the maintenance of international peace and security, expressly excluding such areas such as piracy, drug trafficking, trafficking in children and women, and slavery.[194] In its work in 1996 on the same subject,[195] the Commission had considered that the draft code should cover only the most serious international crimes. Yet the provisions of national legislation defined various offences that, while they fell outside the scope of immunity *ratione materiae,* could entail the prosecution of State officials before the criminal courts of the host State.

10. Those considerations led him to suggest a number of improvements to draft article 5. First, the distinction between the members of the troika and other State officials who enjoyed immunity *ratione materiae* should be reflected in the text. For that purpose, draft article 5 should become draft article 7, following draft articles 4, 5 and 6, which the Commission had considered in 2013.[196] Second, it should be understood that the formulation of the draft article was contingent upon the Special Rapporteur's proposals and the Commission's decision as to which criminal offences would be covered by immunity. With those suggestions, he was in favour of referring draft article 5 to the Drafting Committee.

11. Ms. JACOBSSON said she welcomed the fact that, in paragraph 15 of the third report, the Special Rapporteur stipulated that the three normative elements of immunity *ratione materiae* identified in paragraph 13 must not be read as a pronouncement on exceptions to such immunity or as recognition that immunity was absolute in nature.

12. As the Special Rapporteur correctly pointed out in paragraph 24 of her third report, there was no universally accepted definition of the term "official". National definitions reflected national legal and constitutional structures and were therefore not decisive in an international context. The Special Rapporteur's search for a term that corresponded to three criteria—position, functions to perform and representation—went beyond facilitating the work of domestic judges. It was aimed at achieving the universally consistent use of the underlying concept, irrespective of the language used. Nevertheless, she herself was not entirely convinced by the suggestion to abandon the term "official" and replace it with "organ". She feared that it would only cause confusion and would be premature until a better idea was gained of what could be agreed on in substance, particularly with respect to exceptions to immunity.

13. Turning to the draft articles, she said there was a very close connection between the wording of draft article 2 (*e*) (ii) and the definition of an act of a State in article 4, paragraph 1, of the articles on responsibility of States for internationally wrongful acts.[197] That was only to be expected. When a State claimed immunity for a State official who had committed a criminal act in which he or she had acted on behalf of the State, and the act was attributable to the State, then there was no doubt that the State was responsible for the act. That rule reflected the juxtaposition of immunity and impunity. The real challenge was to establish the connection with the State, which was not always apparent, as attested by a number of historical and contemporary examples. Given the possibility that States might attempt to avoid responsibility by disassociating themselves from those who were acting in their name or on their behalf, the list of persons who enjoyed immunity *ratione materiae* should be limited, not expanded.

14. The description of a State official provided in draft article 2 (*e*) (ii) was a good starting point, but its application across differing national constitutional and legal structures could result in inconsistencies, something that must be avoided. Another solution might be to refrain from defining the term "State official" altogether, given the lack of a definition at the international level; however, it would be difficult, if not impossible, to identify the exceptions to immunity without a clear idea of the categories of persons covered by the term "State official".

15. The wording of draft article 5 was somewhat confusing, since it seemed to imply that only State officials who exercised elements of governmental authority enjoyed immunity *ratione materiae*. Mr. Murase's suggestion to

[194] See *Yearbook … 1951*, vol. II, document A/1858, p. 134, para. 52 (*a*).

[195] The draft code adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

[196] *Yearbook … 2013*, vol. II (Part Two), pp. 38–39, footnotes 234–236.

[197] General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

refrain from using the term "*ratione personae*" altogether was interesting and should be discussed in the Drafting Committee. She was in favour of referring the draft articles to the Drafting Committee.

16. Mr. WISNUMURTI said that it was unclear how to answer the questions of who enjoyed immunity *ratione materiae*, what types of acts were covered by such immunity and over what period of time such immunity could be invoked and applied, due to the lack of uniform practice in those areas. Consequently, he agreed with the Special Rapporteur's proposal to determine which persons would be covered by immunity *ratione materiae* only by applying "identifying criteria" on a case-by-case basis. In paragraph 111 of her third report, the Special Rapporteur proposed three criteria for identifying what constituted an official. In the first criterion, the element of connection with the State was important in establishing a valid link between the official and the act performed, on the one hand, and the State, on the other. However, the idea that the connection could be *de jure* or *de facto* would have the effect of broadening the notion of "connection with the State". In the second criterion, it was unnecessary to state that the official acted "internationally", as it was sufficiently clear that he or she acted as a representative of the State, irrespective of where or in what context the act was committed. The notion of performing official functions was different from that of acting as a representative of the State and should therefore constitute a separate criterion. In the third criterion, the phrase "exercises elements of governmental authority" and the final sentence were superfluous.

17. He agreed with the Special Rapporteur that the criteria for identifying the meaning of "official" should apply to those State officials who enjoyed immunity *ratione personae* as well as to those who enjoyed immunity *ratione materiae*. He also agreed that, in order to identify a person as an official, it must be determined on a case-by-case basis whether all the criteria had been met. In his view, the use of the term "organ" to designate the persons who enjoyed immunity would cause problems of interpretation and misunderstanding and would be inconsistent with State practice, in which the term "official" was widely accepted. Despite certain linguistic weaknesses inherent in the term "official", he firmly believed that the Commission should retain it in the title of the topic as well as in the content of the draft articles.

18. With regard to draft article 2 (*e*), he agreed with the Special Rapporteur that the definition of State official should include the members of the troika and any other person who enjoyed immunity *ratione materiae*. He likewise agreed with Sir Michael that subparagraph (*e*) (ii) needed to be simplified. As it currently stood, it was an amalgam of overlapping elements that led to confusion and could pose difficulties for authorities charged with interpreting the definition.

19. As to draft article 5, he agreed with Mr. Park's observation that, as currently worded, it excluded the members of the troika, who also enjoyed immunity *ratione materiae*. He was of the opinion that the phrase "State officials who exercise elements of governmental authority" excluded the other elements of the criteria for identifying an official who enjoyed immunity *ratione materiae*. The text should therefore be reformulated.

20. With those comments and suggestions, he supported referring the two draft articles to the Drafting Committee.

21. Mr. HASSOUNA commended the Special Rapporteur on the excellent analysis contained in her well-researched third report.

22. She had relied to a significant extent on the contents of treaties in order to define "State official". Immunities under treaties had thus been used, carefully and successfully, to define immunities that did not stem from treaties. On the other hand, the link between the attribution of conduct of public officials to a State in the context of State responsibility and the definition of "State officials" in the context of immunity was unclear. The Special Rapporteur might wish to specify the situations in which the rules of attribution set forth in the articles on responsibility of States for internationally wrongful acts could be used to delimit the scope of the definition of State officials who enjoyed immunity from criminal jurisdiction. A provision to that effect might read: "When a State asserts immunity for a government official entitled to immunity *ratione materiae* for acts that are *ultra vires* or otherwise private, that conduct is adopted by the State and the State is responsible under international law for the wrongful act." That language was consistent with that of the judgment of the International Court of Justice in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*.

23. It would also be helpful to clarify to what extent officials of federal entities who represented the Government of their entity abroad should be entitled to immunity from criminal prosecution for acts performed in the exercise of their functions. It should be made plain that the definition of "State officials" was not confined to central Government officials when agents of federal entities exercised elements of State authority.

24. The distinction drawn in draft article 2 (*e*) (i) and (ii) was inadvisable, since it seemed to suggest that the members of the troika constituted a discrete class of State official, whereas for the purpose of defining "State official", they were merely examples of officials who were also covered by the general definition contained in subparagraph (ii). If, however, the Special Rapporteur were to deem it necessary to deal with the troika in a separate clause, then diplomatic agents, another category of State official, should also be mentioned in a separate clause. The draft articles should differentiate between diplomatic agents, who were explicitly protected under customary international law so that a State might send representatives abroad for the conduct of international relations, and other government officials.

25. The definition proposed in subparagraph (ii) appeared to match the identifying criteria listed in paragraph 111 of the third report, but more attention should be paid to the wording. The relationship between acting "on behalf" of a State and "in the name" of a State should be made clear in order to ensure that persons acting "on behalf of", but perhaps not "in the name of" the State,

were not excluded from the application of the definition. Similarly, the alternative of either representing the State or exercising elements of governmental authority suggested that the exercise of governmental authority did not include an element of representation. Since the concept of governmental authority was not defined in the third report, despite its importance, it would be wise to include in the commentary some examples of persons exercising such authority, or at least a definition of the term, and to explain that it did not imply a representative of the executive branch of Government. A more precise formulation would be "State authority". He was in favour of simplifying subparagraph (ii) to read "any other person who acts on behalf of the State enjoys immunity *ratione materiae*".

26. The statement in draft article 5 that "State officials who exercise elements of governmental authority benefit from immunity *ratione materiae* in regard to the exercise of foreign criminal jurisdiction" was questionable, since it could be taken to imply that State officials who exercised governmental authority constituted a distinct or separate category, which was not the case. For that reason, it should be deleted.

27. He commended the Special Rapporteur on her in-depth analysis of the complex terminological issues raised by the topic. The suggestion that the term "official" be replaced with "organ" was problematic, however, because the latter term could also refer to sets of persons, services or institutions acting on behalf of the State, whereas the topic concerned the individual criminal responsibility of persons acting on behalf of the State. Moreover, it was not certain that the word "organ" could be used in that context in Arabic, Chinese and Russian. A definition of a State official based on easily comprehensible terms could be provided by making it plain that a person's title and position in the organization of a State were not decisive when determining whether they came within the definition of "State official". Lastly, the term "State official" offered the advantage of referring to individuals and of being suitable for use in a broad sense, enabling it to be applied to all categories of persons covered by immunity from criminal jurisdiction.

28. He agreed with the referral of the two draft articles to the Drafting Committee.

29. Mr. FORTEAU, referring to the assertion by Mr. Kamto and Mr. Hassouna that legal entities could not bear criminal responsibility, said that it was not entirely true. In France, for example, the courts had recognized the immunity *ratione materiae* of legal persons in criminal proceedings. In the *Erika* case, the Criminal Chamber of the *Cour de cassation* had found, in a decision of 23 November 2004, that the Malta Maritime Authority, which was a Government agency, enjoyed immunity *ratione materiae*. Legal persons could therefore not be excluded from the scope of the subject. A phrase along the lines of "State representatives and agents" (*représentants et agents de l'État*) would cover that kind of entity. The commentary could then supply the requisite clarifications.

30. Mr. KAMTO said it was difficult to see how a criminal penalty could be imposed on a company, other than by sentencing its senior management. The criminal responsibility of a legal person rested on attribution, because the senior management assumed responsibility for a crime committed by the company. The execution of a sentence against a legal person took the pecuniary form, because a legal person could not be imprisoned.

31. Mr. FORTEAU said that, under article 121-2 of the French Criminal Code,[198] legal persons could bear criminal responsibility, independently of the responsibility of their senior management or subdivisions. Punitive damages and administrative penalties could be imposed on companies.

32. Mr. SABOIA agreed with Mr. Forteau. In Brazil, a number of companies had been ordered to pay hefty fines for crimes against the environment. He did not rule out the possibility that, in the future, legal persons and even the State might incur criminal liability for serious international crimes.

33. Mr. PETRIČ commended the Special Rapporteur on her extensively researched third report. It dealt exclusively with the question of who enjoyed immunity *ratione materiae*, the Commission having decided the previous year that only the troika was entitled to immunity *ratione personae*.[199] He personally still held that, in accordance with the realities and needs of modern international relations, immunity *ratione personae* should be extended to other high-ranking State officials who represented the State in international relations, and not limited to the troika.

34. Like many earlier speakers, he would prefer to retain the term "State official" in the English version of the draft articles. "Organ" and "agent" were less apt, as immunity was granted to a natural person or individual, whereas the word "organ" also encompassed collective State organs and legal persons.

35. Since the topic was confined to immunity from foreign criminal jurisdiction, and as standards differed widely in civil as opposed to criminal procedure, it would not be appropriate for the Commission to study cases concerning immunity in civil disputes before national courts. He agreed with Mr. Murphy's comments in that respect.

36. The fact that immunity basically involved a relationship between States, not between a State and an individual, raised several questions. A State could claim immunity in another State for somebody not listed among their State officials, or for somebody not corresponding to the parameters of the definition which the Commission might adopt, provided that this person had acted under the State's orders or instructions. It was up to the other State to accept or reject that claim, even if the person in question was regarded as a State official by the first State. In the contemporary world, the fact that public–private partnerships had taken over many functions previously performed by States made it even more difficult to establish a list of State officials or a general definition. He was not sure that it was even useful to try to establish such a definition or list. The key issue in the context of immunity *ratione materiae* was

[198] Available from www.legifrance.gouv.fr, in French under *Les codes en vigueur* and some English translations under *Traductions*.

[199] See *Yearbook … 2013*, vol. II (Part Two), pp. 39 *et seq.*, paras. 48–49, draft articles 3 and 4 and the commentaries thereto.

whether an act of an individual was an act of a State, in other words whether the individual had acted on behalf of the State. Immunity *ratione materiae* did not derive from the status of the person involved; the State had to prove that the individual had acted on its behalf as its official, agent or especially authorized person.

37. Both draft articles proposed in the third report should be referred to the Drafting Committee, which should simplify them.

38. Mr. SABOIA, referring to Mr. Petrič's comment that the issue of immunity *ratione materiae* intrinsically implied a relationship between States and that it was sufficient for a State to claim that a person was acting on its behalf for that person to enjoy that immunity, said he wished to know whether, if a State claimed that a terrorist or a spy had acted on its behalf, the other State had to accept that claim and grant immunity.

39. Sir Michael WOOD drew attention to the *Khurts Bat* case where an English court had followed the argument of the counsel of the Foreign and Commonwealth Office that the accused, who was to be extradited to Germany to face prosecution for offences similar to torture, on behalf of Mongolia, would not enjoy immunity in the territorial State, Germany.

40. Mr. PETRIČ said that his point had been that it was doubtful whether the Commission would be able to devise a satisfactory definition of "State official", and if it did, it might subsequently discover that it had established some dubious limitations. It would be better to answer the question who should be entitled to immunity *ratione materiae* by determining the acts that could be attributed to the State.

41. Mr. NOLTE congratulated the Special Rapporteur on the meticulous research underpinning her third report. He agreed that any consideration of the official acts that would trigger immunity *ratione materiae* and of exceptions thereto should be left to a later stage of the Commission's deliberations. The terminological difficulties in French could be resolved by Mr. Forteau's suggestion to translate the term "official" into French as *représentants et agents*. He doubted whether it was appropriate to transpose the definition of "agent" contained in draft article 2 of the articles on responsibility of international organizations,[200] which had been developed with the specific needs of international organizations in mind, to the sphere of States. While he also agreed that the Commission should not adopt the term "organ" instead of "official", that term should not be explicitly excluded, as it was in the aforementioned article 2. The phrase "other person or entity", also in article 2, was problematic, since someone other than an official should not be defined as an official. The Commission should not attempt to deal with the immunity of legal persons from foreign criminal jurisdiction, as that would only add further complications to an already difficult topic.

[200] See the draft articles on the responsibility of international organizations adopted by the Commission at its sixty-third session and the commentaries thereto in *Yearbook … 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

42. He concurred with Mr. Forteau and Mr. Tladi that "official" should be defined in such as way as to leave room for the notion of "official act" to serve an independent purpose. It was, however, questionable whether defining "official" more broadly than what was encompassed by "official acts" would serve any practical purpose. The term *agent* in the French text had the advantage of signalling that the person concerned did not necessarily have to have the formal status of a State official. He echoed the doubts expressed concerning the distinction drawn between individuals who had a "relationship" with the State and those who acted on its behalf, as the latter necessarily implied the former. He also questioned the inclusion in draft article 2 of the qualification that State officials acted not only "on behalf of" but also "in the name of" the State. Was the implication that all such persons must always announce that they acted for the State? Was the phrase "and represents the State or exercises elements of governmental authority" intended to limit the definition to those who exercised a specific form of public authority? Did it exclude those who worked for a legally separate public entity or otherwise could not claim to represent the State as such? In his view, references to the nature of the function exercised and the position held in the organization of the State had a place in the commentary but should not be included in the definition itself, as they made it unclear.

43. In paragraph 147 of her third report, the Special Rapporteur had used professors as examples of persons who had formal connections with the State but were nonetheless not assigned to functions involving the exercise of governmental authority. In Germany, professors were considered to be acting on behalf of the State, and even exercising governmental authority, when they performed tasks such as grading final exam papers, which involved issuing administrative acts that could be challenged in court. It was doubtful whether professors should be entitled to immunity from foreign criminal jurisdiction, however. The example served to demonstrate that the Commission should consider whether there should be a lower threshold for persons who acted on behalf of the State. It was not a question of drawing a distinction between low-level and high-level officials—police officers, for instance, were low-level officials but doubtless enjoyed immunity *ratione materiae*—rather, it was a matter of identifying those officials who, in acting on behalf of the State, did not perform functions that were typical for the State.

44. The Special Rapporteur had set herself a very ambitious agenda for her next report. The question of what was an "official act" and the issue of possible exceptions to immunity would each require more study and debate than the definition of "State official".

45. Mr. ŠTURMA, praising the Special Rapporteur's third report, welcomed the identification, in paragraph 13 thereof, of three characteristics for the scope of immunity: subjective, material and temporal. However important it might be to define which persons enjoyed immunity *ratione materiae*, the key element was the definition of official acts, because immunity *ratione materiae* was functional in nature, relating to the exercise of governmental authority rather than to the persons who exercised it. The

Special Rapporteur would surely deal with the kinds of official acts covered by such immunity—which differed from private acts and crimes under international law, neither of which should benefit from immunity—in due course.

46. With regard to terminology, he agreed with those who favoured the English term "official" over "organ", as immunity from foreign criminal jurisdiction was enjoyed by natural persons, rather than entities. The problem was not purely linguistic: seemingly similar terms could carry different connotations in different languages, reflecting differences in States' civil service systems. An "official" of one State might not have the same status in another State. Moreover, as the Special Rapporteur had pointed out, the definition must be broad enough to include not only officials in the State administration, but also persons exercising legislative or judicial functions. The various connotations arising from domestic law should pose no obstacle, however, as any definition would be adopted in the context of international law.

47. As to how broad the definition of "official" should be, he agreed with the three conclusions in paragraph 111 of the third report. However, he did not think that all of the criteria included therein needed to appear in the definition of a State official in draft article 2 (*e*), as official acts would be defined separately. Mr. Forteau's proposal, inspired by article 2 (*d*) of the articles on the responsibility of international organizations, had certain merits. It would be broad enough to include the situations covered by articles 4 and 5 of the articles on responsibility of States for internationally wrongful acts and might encompass those envisaged in article 9. However, the definition of an official should not cover conduct of private individuals acknowledged and adopted by a State as its own (art. 11) or conduct of a group of persons, such as paramilitaries, directed or controlled by a State (art. 8), as that could be taken as an invitation to abuse of immunity. The definition itself should be brief and simple, with other considerations reflected in the commentary.

48. Turning to draft article 5, he echoed the proposals to delete the words "who exercise elements of governmental authority", which seemed to refer to the nature of acts, rather than to the persons who enjoyed immunity. Alternatively, reference could be made to the exercise of official acts, although that would introduce the material and temporal scope of immunity. The Special Rapporteur had stated her intention to cover those aspects in her third report and he fully supported that approach.

49. In conclusion, he recommended that all the draft articles be referred to the Drafting Committee.

50. Mr. KITTICHAISAREE commended the Special Rapporteur on her well-researched third report. He expressed full support for her conclusion that it was impossible to list all those who might be classified as officials for the purposes of immunity *ratione materiae* and that identifying criteria were therefore needed, and should be applied on a case-by-case basis. He concurred with those who had suggested that "official", rather than "organ", was the most appropriate English term.

51. Endorsing the characteristics of immunity *ratione materiae* set out in paragraph 12 of the Special Rapporteur's third report, he said that attributing a person's conduct to a State in order to impute to that State responsibility for an internationally wrongful act was quite different from identifying the persons who enjoyed immunity. The former was firmly grounded in the law of tortious or delictual liability, covering many types of person and entities, while the scope of immunity *ratione materiae* was more limited. Not all the persons referred to in chapter II of the articles on responsibility of States for internationally wrongful acts were "officials" who enjoyed such immunity.

52. An official who enjoyed immunity *ratione materiae* must hold a position in the organization of the State. There was no sound legal basis or policy justification to extend the scope of that immunity to non-officials, such as private contractors, who were not in a position to exercise inherently governmental authority. In some jurisdictions, such as the United States, private contractors were barred from activities that were inherently governmental in nature and therefore could not fall within the scope of persons acting in the name and on behalf of the State and exercising authority as defined in draft article 2 (*e*) (ii) of the third report.

53. Draft article 2 (*e*) (ii) was well crafted but might need some textual amendment. He agreed with those who had suggested that the phrase "or exercises elements of governmental authority" would cover unusual cases such as that of the Supreme Leader of the Islamic Republic of Iran, who was the *de jure* and *de facto* Head of State in the Islamic Republic of Iran.

54. It was essential to address the relationship between immunity *ratione personae* and immunity *ratione materiae* and to consider whether the latter restricted or extended the scope of the former. While he did not support the suggestion that the term *ratione materiae* not be used, clarification was certainly needed. The possibility that draft article 5 might be taken to exclude persons from enjoying both forms of immunity should be discussed further. It was also to be hoped that the Special Rapporteur's next report would cover acts performed *ultra vires*.

55. The issue of possible exceptions to immunity was likely to prove controversial, and he hoped that the Commission would be able to find sufficient evidence to substantiate any exceptions proposed. Any exception to immunity must not jeopardize the immunity of Heads of State with purely ceremonial roles and no *de facto* authority over acts or omissions that might constitute core crimes proscribed by international law and with respect to which no immunity was permitted. International law must also recognize the immunity granted by the domestic law of a State to its Government officials for acts undertaken in good faith to maintain law and order but without any specific intent to commit human rights violations.

56. Expressing support for the drafting proposal made by Mr. Park in order to extend immunity *ratione materiae* to former members of the troika, and taking account of the suggestion made by Mr. Murphy, he suggested that draft article 5 be amended to read:

"*Draft article 5. Persons enjoying immunity* ratione materiae

"State officials who exercised elements of governmental authority enjoy immunity *ratione materiae* from foreign criminal jurisdiction."

57. Mr. HUANG, observing that the fundamental divisions of principle among the members of the Commission on the topic seemed to be narrowing, expressed concern that the approach being followed continued to focus too much on progressive development and not enough on codification, despite the agreement reached at the previous session. Disputes concerning the relationship between immunity and impunity were connected to that problem. The Commission should focus on codification rather than progressive development, with a view to achieving consensus on what was a complicated and sensitive subject and producing articles that would enjoy wide recognition and application.

58. There was no intrinsic link between immunity and impunity. Immunity from foreign criminal jurisdiction was not intended to absolve officials of their substantive responsibilities; rather, it was a neutral, procedural mechanism. Tackling impunity required political measures, such as those mentioned in the *Arrest Warrant of 11 April 2000* case.

59. Immunity of State officials was closely related to the immunity and responsibility of States. In that context, particular attention should be paid to the Commission's previous discussions on the responsibility of States for internationally wrongful acts. Articles 4 and 5 of the articles on responsibility of States for internationally wrongful acts gave a basis for determining who was an official for the purposes of immunity *ratione materiae*, and the Special Rapporteur had formulated logical criteria in that regard in paragraph 111 of her third report, with which he agreed. In specific cases, more weight should be given to domestic law in determining who counted as an official, as legislation and practice differed widely among States. That said, the definition of an official should not be expanded so far as to include private contractors, for example.

60. The distinction between immunity *ratione materiae* and immunity *ratione personae* should be applied to specific aspects of the topic such as the subjective, material and temporal scope of immunity. Immunity *ratione materiae* stemmed from the principle of the sovereign equality of States and could therefore be considered an extension of State immunity. Denying the possibility of immunity *ratione materiae* would be to deny State immunity, which was unacceptable. High-level officials needed to enjoy immunity in order to discharge their duties effectively. Removing that immunity would constitute serious interference in a country's internal affairs, undermining friendly relations among States and jeopardizing democracy and stability. The fundamental nature of immunity must be preserved, with only a few exceptions for situations in which they were genuinely warranted.

61. The focus on terminology in the Special Rapporteur's third report reflected the particular importance of defining "official" for the purposes of the topic, from the perspective of both immunity *ratione materiae* and immunity *ratione personae*. In the former context, the definition would need to focus on the functions fulfilled, while in the latter, the term would need to designate specific holders of public office who represented the State. In selecting the most appropriate terms, the nature of the office held by a person enjoying immunity must be known, and domestic and international judicial practices must be taken into account. In English, the term "State official" seemed appropriate. The term "organ", suggested by the Special Rapporteur, most commonly referred to entities. In addition to English, French and Spanish, consideration should be given to terminology in the Commission's other three working languages so as to ensure consistency. Using "organ" to refer to individuals would cause problems of translation in Chinese, for instance.

62. Given the importance of the topic, the Commission should strive to complete its work within the current quinquennium. He expressed support for the suggestion to transmit draft article 5, as formulated by the Special Rapporteur, to the Drafting Committee.

The meeting rose at 12.55 p.m.

3221st MEETING

Thursday, 10 July 2014, at 3 p.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Huang, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/666, Part II, sect. B, A/CN.4/673, A/CN.4/L.850)

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the third report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/673).

2. Mr. VÁZQUEZ-BERMÚDEZ said that, as the Special Rapporteur had pointed out, the three normative elements of the immunity *ratione materiae* of State officials from foreign criminal jurisdiction, namely the subjective, material and temporal scopes, should be considered together in order to define the legal regime for that type of immunity.